

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:WR:SCA:LN:TL-N-7076-99
TIRussell

date:

to: Gerald M. Molina, Team Coordinator
Lorna Fenton, Case Manager/CE1103

from: District Counsel, Southern California District, Laguna Niguel

subject: Correct Name ON Form 872 - Statute Extension

You asked us to confirm the correct name to use in a Form 872, Consent to Extend the Time to Assess Tax, for a Consolidated Group, [REDACTED], for the taxable fiscal year ended [REDACTED].

FACTS

We understand the relevant facts to be as follows.

During the taxable fiscal years in issue, March 31, [REDACTED] and March 31, [REDACTED], [REDACTED] filed consolidated returns as the common parent of a Consolidated Group.

Absent an extension, the assessment period for the taxable fiscal year ending March 31, [REDACTED] will expire on December 31, [REDACTED].

On [REDACTED], the vice president of [REDACTED] and a delegate of the Commissioner executed a Form 872 for the taxable fiscal years ending March 31, [REDACTED] and March 31, [REDACTED], extending the assessment periods for both years to [REDACTED]. The Form 872 identifies the taxpayer as "[REDACTED]" (both on the front page, and above the vice president's signature on the back page).

[REDACTED] was involved in a merger in [REDACTED]. Following is a summary of the merger as set forth in an opening page of an SEC form Schedule 14D-9.

* * * [O]n [REDACTED], the [REDACTED] (the "Company") entered into an Agreement and Plan of Merger (the "Merger Agreement") with [REDACTED], a

societe anonyme organized under the laws of France ("██████████"), and ██████████, a Delaware corporation and an indirect subsidiary of ██████████ which was formed in connection with the Merger Agreement (the "Purchaser"). Pursuant to the Merger Agreement, the Purchaser today commenced a tender offer (the "Offer") to purchase all outstanding shares of the Company's common stock * * * for \$██████████ per Share in cash * * *. Under the Merger Agreement, the Offer will be followed by a merger (the "Merger") of the Purchaser with and into the Company, and all Shares not purchased in the Offer * * * will be converted into the right to receive \$██████████ per Share in cash in the Merger.

The vice president of ██████████ explained that ██████████ owned ██████████% of a first tier subsidiary, ██████████, which in turn owned ██████████% of ██████████. That is why ██████████ is referred to as an "indirect" subsidiary of ██████████ in the opening page of the SEC form Schedule 14D-9.

Also, the vice president of ██████████ stated that henceforth ██████████ will be included in the consolidated return filed by ██████████.

LEGAL ANALYSIS

Generally, the common parent, with certain exceptions not applicable here, is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Treas. Reg. section 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given shall be considered as having also been given or executed by each such subsidiary. Id. Thus, generally the common parent is the proper party to sign consents, including Forms 872, for all members of the group. Id. Where the common parent remains in existence, even if it is no longer the common parent, it remains the agent for the group with regard to years in which it was the common parent of the group. Id.; Southern Pacific Co. v. Commissioner, 84 T.C. 395, 401 (1985).

Temp. Reg. section 1.1502-77T, which was promulgated in 1988 by the Service to supplement Treas. Reg. section 1.1502-77, modifies the "exclusive agent" rule of Treas. Reg. section 1.1502-77(a). Where a common parent corporation ceases to be the common parent of a group, whether or not the group remains in existence, Temp. Reg. section 1.1502-77T(a)(4) provides "alternative agents" for the affiliated group, but only for purposes of mailing notices of deficiency and for executing waivers of the statute of limitations.

Under Temp. Reg. section 1.1502-77T(a)(4), any one or more of the following corporations may act as "alternative agents" for the group:

- (i) The common parent of the group for all or any part of the year to which the notice or waiver applies,
- (ii) A successor to the former common parent in a transaction to which section 381(a) applies,
- (iii) The agent designated by the group under section 1.1502-77(d), or
- (iv) If the group remains in existence under section 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

Temp. Reg. section 1.1502-77T is effective for taxable years for which the due date (without extensions) for filing the consolidated return is after September 7, 1988. Temp. Reg. section 1.1502-77T(b). Simultaneous with the promulgation of the temporary regulation, the Service amended Treas. Reg. section 1.1502-77 by adding paragraph (e), cross referencing to Temp. Reg. section 1.1502-77T.

1. [REDACTED] is the Agent for the Consolidated Group for the Years in Issue.

The opening page of the SEC form Schedule 14D-9 describes a downstream merger of [REDACTED] into [REDACTED]. That being the case, [REDACTED] survived the merger (or succeeded [REDACTED]) and remained in existence the day after the merger, [REDACTED]. However, [REDACTED] will henceforth be included in the consolidated return of the immediate corporate parent of the former [REDACTED].

Temp. Reg. section 1.1502-77T governs here. It applies to this case because: (a) [REDACTED], the common parent corporation of the Consolidated Group during the years in issue, has ceased to be the common parent; and (2) the statutes of limitations that Exam seeks to extend are for taxable years for which the due date (without extensions) for filing of the consolidated return is after September 7, 1988.

Temp. Reg. section 1.1502-77T(a)(4)(i) provides as an "alternative agent" the common parent of the group for all or any part of the year to which the notice or waiver applies. [REDACTED] was the common parent of the

Consolidated Group for the years to which the notice or waiver applies.

Accordingly, unless [REDACTED] has ceased to exist (e.g., by reason of a dissolution or a subsequent merger in which another corporation succeeded it), then [REDACTED] is a proper party to execute a Form 872 (Consent to Extend the Time to Assess Tax) with respect to the Consolidated Group for the group's taxable years ending March 31, [REDACTED] and March 31, [REDACTED]. Only one Form 872, covering the two years at issue, need be obtained.

2. The Proper Language to Use on Form 872.

The Form 872 executed [REDACTED] is captioned "[REDACTED], " and designates the taxable years covered as the periods ended March 31, [REDACTED] and March 31, [REDACTED]. Given that [REDACTED] is still in existence, this is proper.

The signature block on the second page of the Form 872 executed [REDACTED] reads:

[REDACTED]
Vice President
[name of current officer]

This should be adequate.

3. A Current Officer of [REDACTED]
Should Execute the Form 872.

The Form 872 should be executed by an authorized officer of [REDACTED]. I.R.C. section 6501(c)(4) provides that the Service and a taxpayer may consent in writing to an extension of the time for making an assessment if the consent is executed before the expiration of the normal period of assessment or the extension date agreed upon in a prior extension agreement between the parties.

Generally, it is preferred that the Form 872 also designate that it "is with respect to the consolidated return liability of the Consolidated Group for the group's taxable years ending * * *." However, the current Form should be adequate.

There should not be any confusion created by the reference to the subsidiaries, but it appears that the name of the corporation is simply "[REDACTED]."

Code section 6061 provides that any return, statement or other document made under any internal revenue law must be signed in accordance with the applicable forms or regulations.

The regulations under I.R.C. section 6501(c)(4) do not specify who may sign consents. Accordingly, the Service will apply the rules applicable to the execution of the original returns to the execution of consents to extend the time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

In the case of corporate returns, section 6062 provides that a corporation's income tax return must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. The fact that an individual's name is signed on the return is prima facie evidence that the individual is authorized to sign the return. I.R.C. section 6064. Accordingly, any such officer of [REDACTED] may sign the Form 872.

4. Documents that the Service Should Obtain to Insure the Validity of the Form 872.

Press releases in late [REDACTED], available on [REDACTED] [REDACTED]'s and [REDACTED]'s respective internet web sites, discuss or refer to a "creation" of [REDACTED] effectively combining the operations of [REDACTED] and [REDACTED] [REDACTED]. It is unclear from the press releases if the reference to "[REDACTED]" means [REDACTED] or a subsidiary thereof; or if so, whether: (1) [REDACTED] merged with [REDACTED] and the successor entity is a subsidiary of [REDACTED] or the successor entity has been named [REDACTED]; or (2) [REDACTED] and [REDACTED] are subsidiaries of [REDACTED].⁴

You informed us on December 3, 1999, that you spoke with the vice president of [REDACTED] and he indicated that [REDACTED] continues to

[REDACTED] appears to refer to itself as "[REDACTED]."

If [REDACTED] has merged into [REDACTED] or [REDACTED] (or another corporation), a different identifying name would have to be used on the Form 872 (such as, e.g., "[REDACTED], successor to [REDACTED]" or "[REDACTED], successor to [REDACTED]").

exist and that it is a first tier subsidiary of [REDACTED]

Nonetheless, we recommend that you further confirm [REDACTED]'s continued existence. For example, as we discussed, a computer search of any recent returns or information statements filed by [REDACTED] (such as estimated taxes), may indicate that [REDACTED] is a subsidiary. Also, since [REDACTED] is (or was) a California corporation, you should be able to confirm its continued existence with the California Secretary of State or the California Department of Corporations.

CONCLUSION

Unless [REDACTED] has ceased to exist,

The regulations provide that the common parent is to notify the district director if its existence will terminate for any reason. Treas. Reg. 1.1502-77(d). Specifically, regulation section 1.1502-77(d) provides:

If the common parent corporation contemplates dissolution, or is about to be dissolved, or if for any other reason its existence is about to terminate, it shall forthwith notify the district director with whom the consolidated return is filed of such fact and designate, subject to the approval of such district director, another member to act as agent in its place to the same extent and subject to the same conditions and limitations as are applicable to the common parent. If the notice thus required is not given by the common parent, or the designation is not approved by the district director, the remaining members may, subject to the approval of such district director, designate another member to act as such agent, and notice of such designation shall be given to such district director. Until a notice in writing designating a new agent has been approved by such district director, any notice of deficiency or other communication mailed to the common parent shall be considered as having been properly mailed to the agent of the group; or, if such district director has reason to believe that the existence of the common parent has terminated, he may, if he deems it advisable, deal directly with any member in respect of its liability.

then it remains an alternative agent for the Consolidated Group
for the taxable years in issue.

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